No. 99-1763

In The Supreme Court of the United States

MAY 25 2000

GULF INSURANCE COMPANY,

Petitioners,

v.

SIEGFRIED CONSTRUCTION, INCORPORATED,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

IS THERE A NATIONAL STANDARD TO BE IMPLIED AS A MATTER OF FEDERAL LAW HOLDING THAT THE WORDS "DECLARED IN DEFAULT", WHEN USED IN A CONSTRUCTION INDUSTRY PERFORMANCE BOND, SHALL MEAN THAT THE OBLIGEE MUST BE TERMINATED FROM THE CONSTRUCTION JOB BEFORE THE COMPENSATED SURETY WILL HAVE ANY OBLIGATION UNDER ITS BOND?

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BRIEF IN OPPOSITION
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STATEMENT OF THE CASE

A. Underlying Events.

Siegfried Construction Inc. (Siegfried), as general contractor for the construction of the Sleep Inn Hotel, employed Jennifer Builders, Inc. t/a Jennifer Drywall (Jennifer) as a subcontractor to install metal door frames, hang dry wall, put up valances, and perform certain trim and other finishing carpentry work. Under the terms of the subcontract Jennifer obtained a performance bond through Gulf Insurance Company (Gulf).

The general conditions of the bond are set forth by the Petitioner on Pages 2 and 3 of the Petition for Writ of Certiorari. However, the bond also provided (as not cited by Petitioner) that the conditions of the bond incorporated by reference all of the terms of the subcontract between Siegfried and Jennifer. (JA 21.)

This subcontract provided Siegfried with a series of actions available to it as contractor whenever the subcontractor became in default, including the right to supplement Jennifer's forces without terminating the subcontract.

During the course of the construction of the hotel, Siegfried repeatedly complained to Jennifer about the quality of its work and its lack of a proper labor force. Jennifer had installed the metal door frames crooked; had hung the dry wall in the wrong sequence and in an unworkmanlike manner; had failed to employ a foreman,

as required, and only had 4 dry wall workers on the job when many more were needed to remain on schedule.

On July 14, 1997, Siegfried sent Jennifer a formal three day notification of intention to terminate for default unless corrections were made. This letter detailed the grievances.

On July 15, 1997, a second more detailed letter was sent to Jennifer, but the problems did not get solved.

On July 22, 1997, Siegfried sent a second notice of failure to perform letting Jennifer know that Siegfried, at its discretion, could now terminate the subcontract or could instead supplement the work forces and take all necessary actions in order to finish Jennifer's work and the project on time.

On July 26, 1997, Siegfried sent a follow-up to the second notice of termination.

On July 28, 1997, Siegfried sent Gulf a notice of claim in which Siegfried announced that it would "almost certainly submit a claim for reimbursement of costs associated with completing and correcting work performed by Jennifer", and along with this July 28, 1997 letter Siegfried sent Gulf a copy of all the prior notices to Jennifer. Gulf responded by forwarding the Siegfried correspondence notice to COP, Inc. (COP), an investigating firm acting on behalf of Gulf.

On August 5, 1997, COP informed Siegfried that it had been retained to "investigate claims against Jennifer's bond."

Steve Siegfried, Vice President of Siegfried, spoke with the representative from COP and told him that Siegfried needed help from Gulf or reinforcement to Jennifer to get the job done because Siegfried was under a deadline. COP told Siegfried that it would investigate and "get back to them". Neither COP nor Gulf had any further communication with Siegfried until Siegfried finished the job and filed it's formal claim. The formal claim could not have been filed until the end of the job when the cost of completion over and above the balance remaining unpaid under Jennifer's contract could be determined.

At no time, did Gulf or COP's representative ever state to Siegfried that terminating Jennifer's contract was a condition precedent to processing a claim under the bond.

REASONS FOR DENYING THE WRIT

I. The petition should be denied because the opinion below followed state law as required.

The conflict that Petitioner, Gulf, addresses is not a conflict between Circuits, but rather a difference between the laws of two states. The instant case applied the law of Virginia while the L & A Contracting case from the Fifth Circuit was addressing the law of Florida.

The per curiam Fourth Circuit opinion being challenged here made it abundantly clear that it was following state law when it declared:

> "Gulf further argues that Siegfried had to actually terminate Jennifer to declare default. Though other

courts have required obligees to terminate a subcontractor to invoke a surety's obligations, see L & A Contracting Co. v. Southern Concrete Servs., Inc., 17 F.3d 106, 111 (5th Cir. 1994); Balfour Beatty Constr., Inc. v. Colonial Ornamental Iron Works, Inc., 986 F.Supp. 82, 85-86 (D. Conn. 1997), Virginia law does not counsel this result. Had the parties intended that Siegfried actually terminate Jennifer before making a claim on the bond, 'such a provision would surely, in clear language, have been inserted in the bond.' Phoenix Ins. Co. v. Lester Bros., Inc., 127 S.E.2d 432, 436 (Va. 1962). Were the court to read such a requirement into the bond, we would be drafting rather than enforcing the bond as written. See D.C. McClain, Inc., 452 S.E.2d at 662 (stating that courts must enforce contracts as written)." (A. 10-11.)

As the Court further observed in A. 13, "Virginia courts have not been overly strict in interpreting the notice requirements of construction bonds. See Southwood Builders, Inc. v. Peerless Ins. Co., 366 S.E.2d 104, 106-07 (Va. 1988) (stating that the principles of strict construction do not apply in favor of sureties for hire);"

This case, for which a writ of certiorari is being sought, was originally filed by Siegfried in the state court and removed by Gulf to the federal court. The decision by the Circuit Court of Appeals does not reach beyond the law of Virginia, and does not represent a conflict between Circuits requiring resolution by this Court.

II. The Petition should be denied because if this issue is important to the surety industry, it can easily rewrite its performance bonds.

If the "surety industry" requires an equating of termination with default, as urged by the Petitioner, the surety industry does not need a ruling by the Supreme Court of the United States. The surety industry can easily provide in its performance bonds that termination is required to establish a declaration of default as a prerequisite to a recovery under the bond if that is what they wish. The fact that they have not inserted a clear declaratory sentence requiring termination as a prerequisite to recovery by an obligee suggests that they wish to maintain the ambiguity of their language to allow them to decide on a case by case basis whether to invoke a technical rejection of a claim after the project is completed. In short, the surety industry can unilaterally resolve this issue themselves by adding a sentence to their bond provisions.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, Gulf's Petition should be denied.

Respectfully submitted,
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